CRIMINAL YEAR SEMINAR

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Webinar

Defense Perspective

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2020 APAAC PRSENTATION OUTLINE
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I. Be Inventive, Don't Assume

A. DON'T ASSUME AN ISSUE HAS ALREADY BEEN RAISED & LOST, JUST BECAUSE THE STATUTE OR RULE ON WHICH IT'S BASED HAS BEEN AROUND A LONG TIME.

1. For example, resisting arrest statute provides 3 different ways it can be committed.

a) A.R.S. § 13-2508(A) defines the crime of resisting arrest as follows:

A person commits resisting arrest by intentionally preventing or attempting to prevent a person reasonably known to him to be a peace officer, acting under color of such peace officer's official authority, from effecting an arrest by:
1. Using or threatening to use physical force against the peace officer or another.
2. Using any other means creating a substantial risk of causing physical injury to the peace officer or another.
3. Engaging in passive resistance.

2. Standard RAJI and most indictments, at least in Pima County, conflate them.

a) Indictment:
Defendant resisted or attempted to resist arrest by any means creating a substantial risk of causing physical injury to a peace officer or another…."

b) Thus, except for the omission of "other" from the phrase "any means," Count 4 charged the defendant using the language of subsection (A)(2).

c) RAJI 25.08

The crime of resisting arrest requires proof that:
One, a police -- a peace officer, acting under official authority, sought to arrest either the defendant or some other person; and
Two, the defendant knew, or had reason to know, that the person seeking to make the arrest was a peace officer acting under color of such peace officer's official authority; and
Three, the defendant intentionally prevented or attempted to prevent the peace officer from making the arrest; and
Four, the means used by the defendant to prevent the arrest involved either the use or threat to use physical force or any other substantial risk of physical injury to either the peace officer or another.

d) Comment to RAJI incorrectly implies it was approved by the COA in a 2011 case. State v. Cagle, 228 Ariz. 374, 377-78 ¶¶ 11, 13 (App. 2011)

3. The use of the word "other," the legislative history of the statute and prior case law indicates that the statute defines 3 different crimes, not one crime that can be committed in different ways, like theft under A.R.S. § 13-1802.

4. A proposal to correct the RAJI to conform to the statute has been submitted to the RAJI committee:

a) The crime of resisting arrest requires proof that:

1. A peace officer, acting under official authority, sought to arrest either the defendant or some other person; and

2. The defendant knew, or had reason to know, that the person seeking to make the arrest was a peace officer acting under color of such peace officer's official authority; and

3. The defendant intentionally prevented, or attempted to prevent, the peace officer from making the arrest [by using or threatening to use physical force] [by using any means other than physical force that creates a substantial risk of causing physical injury to the peace officer or another].

Comment: Use the bracketed language as appropriate to the facts of the case.

5. Fortunately, this error is fundamental, so it can still be raised and won on appeal despite the lack of an objection to the indictment or the jury instruction in the trial court.

6. However, you can help your appellate attorneys a lot by raising these issues in the trial court.

7. And many appellate attorneys are willing to consult with trial attorneys on issues like these.

8. So, show your appellate attorneys (and your clients) a little love.

9. Even though you think you know what the charging statute says, read it again, and look at the case law interpreting it. You may find problems you never imagined.

B. STATE CONSTITUTIONAL ISSUES: MIXTON & FRISTOE (NOT YET FILED)

a) State v. Mixton, *247 Ariz. 212, ¶¶ 14–33 (App. 2019), rev. granted, oral argument 2/13/20 (with Linley Wilson)*

C. CONSECUTIVE PROBATION TERMS ARE ILLEGAL IF CONSECUTIVE PRISON TERMS WOULD BE ILLEGAL

1. *State v. Robertson*, 246 Ariz. 438, ¶¶ 10–16 (App. 2019)

D. PROSECUTORS AND VICTIMS OFTEN OVERREACH IN ASKING FOR RESTITUTION. DEFENDANTS HAVE THE RIGHT TO PUT THEM TO THEIR PROOF, INCLUDING SUBPOENAING THE VICTIM TO TESTIFY

1. *State v. Quijada*, 246 Ariz. 356, ¶¶ 29–34 (App. 2019)

II. ***State v. Mixton*, 247 Ariz. 212 (App. 2019)**

A. THE FOURTH AMENDMENT PROVIDES: "THE RIGHT OF THE PEOPLE TO BE SECURE IN THEIR PERSONS, HOUSES, PAPERS, AND EFFECTS, AGAINST UNREASONABLE SEARCHES AND SEIZURES, SHALL NOT BE VIOLATED," AND IT SPECIFIES A WARRANT PROCEDURE FOR SUCH SEARCHES AND SEIZURES. U.S. CONST. AMEND. IV. BY CONTRAST, ARTICLE 2, SECTION 8, OF THE ARIZONA CONSTITUTION PROVIDES, "NO PERSON SHALL BE DISTURBED IN HIS PRIVATE AFFAIRS, OR HIS HOME INVADED, WITHOUT AUTHORITY OF LAW."

B. JUSTICE BOLICK IN *STATE V. JEAN*, 243 ARIZ. 331, ¶¶ 92-94 (2018) (BOLICK, J. CONCURRING IN PART AND DISSENTING IN PART), *PETITION FOR CERT. DOCKETED*, NO. 17-8419 (U.S. APR. 6, 2018), AND *STATE V. HERNANDEZ*, 244 ARIZ. 1 (2018), HAS BEEN ATTORNEYS TO ARGUE THAT ART. 2, §8 PROVIDES BROADER PROTECTION THAN THE FOURTH AMENDMENT, SO THAT THE COURT CAN FINALLY DECIDE WHETHER OUR CONSTITUTION GRANTS BROADER PROTECTION OUTSIDE THE CONTEXT OF HOME SEARCHES.

C. FACTS

D. PRETRIAL MOTION TO SUPPRESS DENIED

E. ON APPEAL, WE ARGUED THAT:

1. 1) Arizona courts should first determine whether art. 2, §8 requires suppression before looking at the Fourth Amendment;
2) The "reasonable expectation of privacy" test is inapplicable to art. 2, §8. Instead, courts must determine whether the defendant's "private affairs" were disturbed and whether that disturbance was done "without authority of law."

2. Internet users have a right to anonymity when using the internet. Thus, when they take steps to mask their identity on the internet, their identity is part of their "private affairs."

3. Only a search warrant issued by a neutral magistrate based on probable cause provides the necessary "authority of law" to pierce an internet user's anonymity and determine their identity and their location.

4. Third party doctrine should be rejected under art. 2, §8 for both legal and policy reasons.

5. Despite the third party doctrine, defendants have a reasonable expectation of privacy in their online anonymity. Therefore, a warrant is required to determine their identity and location under the Fourth Amendment as well.

6. The "good faith" doctrine should not apply.

F. THE COURT OF APPEALS:

1. Rejected the argument that Arizona court's should address suppression issues under art. 2, §8 first, since "[t]he Arizona Constitution's protections under article 2, section 8 are generally coextensive with Fourth Amendment analysis." *State v. Hernandez*, 244 Ariz. 1, ¶ 23 (2018).

2. Due to the third-party doctrine, internet users have no reasonable expectation of privacy in their online anonymity protected by the Fourth Amendment.

a) U.S. v. Miller, *425 U.S. 435, 443 (1976) (Because "the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed," the defendant had no reasonable expectation of privacy in records of his bank accounts obtained from his bank without a warrant);*

b) Smith v. Maryland, *442 U.S. 735 (1979) (defendant had no reasonable expectation of privacy in phone numbers dialed from his home phone and recorded by a pen register connected to the telephone company's switching equipment at police request without a warrant).*

c) "Federal courts applying this principle have consistently found internet users to have no reasonable expectation of privacy in their IP addresses or in their subscriber information (name, street address, etc.) voluntarily conveyed to third-party service providers." ¶*11*

d) The Court also noted that, in Carpenter v. United States, *138 S. Ct. 2206 (2018), the Supreme Court created an exception to the third-party doctrine for CSLI (cell site location information), but left* Miller *and* Smith *in place.*

3. The "reasonable expectation of privacy" test applies to art. 2, §8, and refused to follow the tests applied by Washington courts under the identical provision of their constitution.

4. The "third party doctrine" does not apply under art. 2, §8.

a) The court noted that the third party doctrine contradicts the way people actually operate on the internet.

b) "Privacy of information normally means the selective disclosure of personal information rather than total secrecy. ... A bank customer may not care that the employees of the bank know a lot about his financial affairs, but it does not follow that he is indifferent to having those affairs broadcast to the world or disclosed to the government."

Richard Posner, The Economics of Justice *342 (1981).*

c) Avidan Y. Cover, Corporate Avatars and the Erosion of the Populist Fourth Amendment, *100 Iowa L. Rev. 1441 (2015) ("[T]he third-party doctrine proves unsupportable in the big data surveillance era, in which communicating and sharing information through third parties' technology is a necessary condition of existence, and non-content data, such as Internet subscriber information ..., provides an intimate portrait of a person's activities and beliefs.").*

d) "In the internet era, the electronic storage capacity of third parties has in many cases replaced the personal desk drawer as the repository of sensitive personal and business information—information that would unquestionably be protected from warrantless government searches if on paper in a desk at a home or office. The third-party doctrine allows the government a peek at this information in a way that is the twenty-first-century equivalent of a trip through a home to see what books and magazines the residents read, who they correspond with or call, and who they transact with and the nature of those transactions. Cf. Riley v. California, *573 U.S. 373, 393-95, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014) (discussing how mass transition from paper data storage to digital data storage has increased privacy interests in cell phones). We doubt the framers of our state constitution intended the government to have such power to snoop in our private affairs without obtaining a search warrant."* ¶*27*

5. Rejected the State's argument that identity information is not entitled to protection under art. 2, §8 because it is "non-content" information.

a) . But information that has been deemed as "non-content," such as a person's bank records, who a person calls or emails, what websites a person visits, or, as here, the identity behind anonymous communications, is part and parcel of a person's private affairs; access to it affords the government significant insight into a person's private activities and beliefs. Warrantless government collection of this information from an internet service provider or similar source thus constitutes a significant and unwarranted intrusion into a person's private affairs—an intrusion our constitution unambiguously prohibits. And we are not persuaded that a person gives up any reasonable expectation of privacy in this information because he or she "voluntarily" reveals his or her identity to an ISP to get service. The user provides the information for the limited purpose of obtaining service. It is entirely reasonable for the user to expect the provider not to exceed that purpose by revealing the user's identity to authorities in a way that connects it to his or her activities on the internet. Therefore, when the government compels the provider to release the internet user's identity in that way, and without a warrant, it invades the user's reasonable expectation of privacy." ¶*28*

6. The court was especially concerned about the impact of the third party doctrine on anonymous speech.

a) "We are especially troubled that the third-party doctrine grants the government unfettered ability to learn the identity behind anonymous speech, even without any showing or even suspicion of unlawful activity. …. Even in benign exercise, the government's ability to identify anonymous speakers, if not meaningfully limited, intrudes on the speaker's desire to remain anonymous and may discourage valuable speech. At worst, the power may be wielded to silence dissent." ¶*29*

7. Affirmed the denial of Mixton's motion to suppress, finding that the officer's acted in good faith when they relied on administrative subpoenas to learn Mixton's identity, and a search warrant to find the actual incriminating images in his home.

G. JUDGE ECKERSTROM CONCURRED WITH JUDGE EPPICH'S HOLDING THAT OBTAINING MIXTON'S IDENTITY INFORMATION FROM HIS SERVICE PROVIDERS VIOLATED ART. 2, §8, BUT ARGUED THAT, AFTER *CARPENTER*, THE THIRD PARTY DOCTRINE NO LONGER APPLIED UNDER THE FOURTH AMENDMENT.

H. JUDGE ESPINOSA AGREED THAT THE REJECTION OF THE MOTION TO SUPPRESS WAS PROPER UNDER THE "GOOD FAITH" EXCEPTION TO THE WARRANT REQUIREMENT, BUT DISAGREED THAT MIXTON'S IDENTITY INFORMATION WAS ENTITLED TO PROTECTION UNDER EITHER THE FOURTH AMENDMENT OR ART. 2, §8.

1. His primary argument, in essence, was that everyone knows that nothing on the internet is private, so there could never be a reasonable expectation of privacy in anything people do online.

I. THE STATE FILED A PETITION FOR REVIEW CHALLENGING THE COURT OF APPEALS' DECISION THAT IDENTITY INFORMATION IS ENTITLED TO PROTECTION UNDER OUR "PRIVATE AFFAIRS" CLAUSE.

1. They argued that interpreting art. 2, §8 differently than the Fourth Amendment would result in chaos for law enforcement and courts.

2. They also argued that the textual differences between the Fourth Amendment and the private affairs clause did not justify a different interpretation.

J. WE RESPONDED THAT, UNDER THE RULES OF STATUTORY CONSTRUCTION, THE DIFFERENT LANGUAGE OF THE PRIVATE AFFAIRS CLAUSE REQUIRES THAT IT BE INTERPRETED MORE BROADLY THAN THE FOURTH AMENDMENT, AS JUSTICE BOLICK ARGUED IN HIS CONCURRENCE IN *HERNANDEZ*;

AND THAT, GIVEN THE NATURE OF THE INTERNET AND THE PRIVACY INTERESTS AT STAKE, EVEN BASIC IDENTIFYING INFORMATION IS ENTITLED TO PROTECTION UNDER THE PRIVATE AFFAIRS CLAUSE.

K. WE FILED A CROSS-PETITION FOR REVIEW AGREEING WITH JUDGE ECKERSTROM THAT, AFTER *CARPENTER*, THE THIRD PARTY DOCTRINE SHOULD APPLY TO ONLINE IDENTITY INFORMATION, AND ARGUING THAT THE SUPREME COURT SHOULD CREATE A SEPARATE EXCLUSIONARY RULE UNDER ART. 2, §8 AND REJECT THE "GOOD FAITH" EXCEPTION, AT LEAST IN THIS CASE.

L. THE COURT ACCEPTED REVIEW OF BOTH THE ART. 2, §8 AND FOURTH AMENDMENT ISSUES BUT DENIED REVIEW OF THE GOOD FAITH ISSUE. THUS, NO MATTER THE OUTCOME, MIXTON WILL REMAIN IN PRISON FOR THE REST OF HIS LIFE.

M. AMICUS BRIEFS BY GOLDWATER INSTITUTE, INSTITUTE FOR JUSTICE, ACLU AND ELECTRONIC FRONTIER FOUNDATION.

N. ORAL ARGUMENT WAS ON FEBRUARY 13, 2020.

III. ***State v. Lietzau*, 246 Ariz. 380 (App. 2019), rev. granted, oral argument 2/18/20**

A. Bryan Lietzau was on probation for aggravated harassment. His conditions of probation included standard clauses consenting to warrantless searches of his "person or property."

B. A woman contacted the probation offense with vague allegations that Lietzau was involved in an "inappropriate relationship" with her 13-year old daughter.

C. Later, his probation officer order his surveillance officer to arrest him for technical violations of his probation.

D. After his arrest, the SO asked for Lietzau's cell phone and began searching it, something he said he does hundreds of times every month. Eventually, the SO found a series of text messages that he believed were between Lietzau and S.E.

E. Because he knew that police officers needed a warrant to search a cell phone, he transcribed the text messages and gave his transcription and the phone to an officer. The officer then got a search warrant based on that information.

F. Contrary to what the COA said, the search of the cell phone pursuant to warrant, and the search of SE's phone, found no text messages between them.

G. Lietzau moved to suppress the results of the SO's search, arguing that, under the US Supreme Court's decision in *Riley v. California*, 573 U.S. 373 (2014), cell phones are different and a warrant is required to search a probationer's cell phone, despite the search provisions of the conditions of probation.

H. The trial court granted the motion to suppress and the State appealed.

I. The Court of Appeals reversed holding that the suspicions about Lietzau's relationship with SE were sufficient to justify the search. The court ignored the Supreme Court's holding in *Riley* that the vast amount of information on cell phones requires greater protection against unreasonable searches, and instead held that the fact that cell phones can be used in sex crimes supported the search.

IV. ***State v. Robertson*, 246 Ariz. 438 (App. 2019), rev. granted 2/12/20, oral argument held 4/14/20**

A. Dimitres Robertson was charged with first degree murder and intentional child abuse.

B. She pled guilty to manslaughter and reckless child abuse, thus avoiding a possible natural life sentence for murder and up to 28 years consecutive for child abuse.

C. Plea agreement required a prison sentence for manslaughter and consecutive probation for child abuse.

D. THE TRIAL COURT SENTENCED HER TO 10 YEARS IN PRISON FOR MANSLAUGHTER AND PLACED HER ON LIFETIME PROBATION FOR THE OTHER OFFENSE.

E. AFTER HER RELEASE FROM DOC, SHE VIOLATED PROBATION TWICE BUT WAS REINSTATED ON PROBATION.

F. HOWEVER, NEARLY 7 YEARS AFTER HER RELEASE FROM PRISON, THE STATE FILED ANOTHER PETITION TO REVOKE.

G. FOR THE FIRST TIME, ROBERTSON ARGUED THAT A PRISON SENTENCE FOR CHILD ABUSE WOULD BE AN ILLEGAL CONSECUTIVE SENTENCE UNDER A.R.S. § 13-116, THE ILLEGAL PUNISHMENT STATUTE, WHICH REQUIRES CONCURRENT SENTENCES FOR MULTIPLE CONVICTIONS FOR THE SAME ACT.

> 1. Section 13-116 bars a court from punishing a defendant more than once for a single act. It states that "[a]n act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent."

H. THE TRIAL COURT REJECTED THAT CLAIM AND SENTENCED HER TO ANOTHER 3.5 YEARS IN PRISON.

I. THE COURT OF APPEALS AFFIRMED THAT SENTENCE, FINDING THAT ROBERTSON HAD INVITED THE ERROR BY STIPULATING TO CONSECUTIVE PROBATION IN HER PLEA AGREEMENT IN ORDER TO AVOID LIFE IN PRISON. ¶¶ 13-17

J. **REVIEW GRANTED**

K. COUNSEL FOR ROBERTSON (LARRY MATTHEWS, MARICOPA COUNTY PUBLIC DEFENDER'S OFFICE) FILED A PETITION FOR REVIEW ARGUING THAT APPLICATION OF THE INVITED ERROR DOCTRINE WOULD VIOLATE ROBERTSON'S RIGHT TO APPEAL BY INSULATING ANY ILLEGAL SENTENCE REQUIRED BY THE TERMS OF A PLEA AGREEMENT FROM REVIEW, AND THAT THAT DOCTRINE WAS NOT PROPERLY APPLIED IN THIS CASE.

L. DAVID EUCHNER FROM MY OFFICE AND I FILED AN AMICUS BRIEF ON BEHALF OF AACJ (ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE).

M. WE ARGUED THAT THE COA FAILED TO EVEN CONSIDER NUMEROUS CASES HOLDING THAT TRIAL COURTS MAY NOT IMPOSE SENTENCED NOT AUTHORIZED BY STATUTE AND THAT PARTIES MAY NOT GRANT THE COURT AUTHORITY TO IMPOSE ILLEGAL SENTENCES BY AGREEMENT, INVITED ERROR, WAIVER OR OTHER MEANS. *COY V. FIELDS*, 200 ARIZ. 442 (APP. 2001), AND *POLK V. HANCOCK*, 237 ARIZ. 125 (2015).

N. IN ADDITION, UNDER *COY*, THE STATE BEARS THE RESPONSIBILITY FOR ANY ERRORS IN PLEA AGREEMENTS, SINCE THEY ARE RESPONSIBLE FOR ENFORCING THE LAW AND THUS IS IN A BETTER POSITION TO KNOW IT BEST.

> 1. "The sentencing provisions enacted by our legislature are mandatory and may not be circumvented by agreements between prosecutors and defendants." *State v. Kinslow*, 165 Ariz. 503, 507 (1990); *In re Webb*, 150 Ariz. 293, 294 (1986) ("Courts have power to impose sentences only as authorized by statute and within the limits set by the legislature.").

2. Therefore, "parties [to a plea agreement] cannot confer authority on the court that the law proscribes," *State ex rel. Polk v. Hancock*, 237 Ariz. 125, 129 ¶ 10 (2015), or grant a court the power to impose a sentence that the law does not allow, *State v. Serrano*, 234 Ariz. 491, 493 ¶ 4 (App. 2014).

3. The issue in this case was squarely before the court of appeals in *Coy*, where the court held that a defendant cannot be precluded from challenging an illegal sentence even where that sentence is specifically allowed under her plea agreement. 200 Ariz. at 444 ¶ 6.

4. "the state bears the risk when, as here, a sentencing or probation provision in one of its plea agreements proves to be illegal and unenforceable." *Id*. at 446 ¶¶ 12-13.

5. *Polk*, 237 Ariz. at 129 ¶ 10. This Court further determined that the State could not be allowed to withdraw from a plea based on the striking of an illegal term within that plea agreement. *Id*. at 131 ¶ 22.

6. *Polk* and *Coy* make clear that a defendant's acceptance of a plea agreement containing an illegal sentencing provision does not bar her from challenging that provision, nor does it empower the court to impose a sentence in contravention of our laws.

7. Nor are such cases involving challenges to prison sentences after a failed probationary term unusual. In *Wright v. Gates*, 243 Ariz. 118 (2017), this Court addressed the legality of sentencing a defendant for the crime of "solicitation to commit molestation of a child, a dangerous crime against children," where the child was nonexistent and instead was an officer posing as a child. Wright was arrested in 1992 and thereafter accepted a plea agreement to two preparatory offenses and was placed on lifetime probation for both; and when he failed on probation in 2002, he was sentenced to a 10-year prison term on one and reinstated on probation following that sentence as to the other. *Id*. at 119-20 ¶¶ 2-3. It was not until after the State sought to revoke Wright's probation as to the second offense in 2014 (and again in 2015) that Wright raised the issue that his offenses were not dangerous crimes against children. *Id*. at 120 ¶¶ 4-5. Despite the fact that the challenge to the sentencing allegation was made more than two decades after the plea agreement was entered, this Court found that the allegation was illegal in this case and remanded with an order for the trial court to dismiss the allegation. *Id*. at 122 ¶ 18, 20.

O. ORAL ARGUMENT BEFORE THE SUPREME COURT WAS LAST TUESDAY. BASED ON THEIR COMMENTS, THE JUSTICES SEEMED CONCERNED ABOUT THE APPLICATION OF A DOCTRINE THAT WOULD ALLOW THE IMPOSITION OF ILLEGAL SENTENCES AND BAR THE DEFENDANT FROM CHALLENGING THEM.

P. ON JANUARY 21 OF THIS YEAR, JUST BEFORE THE SUPPLEMENTAL BRIEFS WERE FILED IN THIS CASE, DIVISION 1 OF THE COURT OF APPEALS HELD THAT § 13-116 BARS THE IMPOSITION OF A CONSECUTIVE TERM OF PROBATION WHERE A CONSECUTIVE PRISON SENTENCE WOULD ALSO BE ILLEGAL. *STATE V. WATSON*, ___ ARIZ. ___, 459 P.3D 120 (APP.

2020). Invited error was not addressed in that case because the defendant was convicted by a jury.

V. ***State v. Quijada,* 246 Ariz. 356 (App. 2019)**

A. House sitter invited Quijada and another person to the victim's home. Quijada distracted the house sitter while the codefendant stole various things from the house. Quijada pawned 3 of the items & shared the proceeds with codefendant.

B. House sitter identified Quijada & codefendant as the thieves.

C. Quijada pled to facilitation to commit trafficking in stolen property & agreed to pay restitution of up to $100,000 for all charged counts. Trial court put her on probation, & retained jurisdiction to determine restitution.

D. The victim's claim of the missing items increased throughout the process beginning with her initial interview to her final claim for $45,000+, $39,000 more than her initial claim. ¶25

E. Her claim included a Rolex watch she told the first officer she had never owned.

F. The State's efforts to get the victim to attend restitution hearings, both by subpoena & voluntarily, were unsuccessful.

G. But trial court ordered Quijada to pay nearly $40,000 in restitution, including the costs of a new security system at the victim's home. (Interesting issue that I don't plan to talk about).

H. After the trial court extended her probation because she still owed restitution, Quijada filed a post-conviction relief petition challenging the restitution for lack of evidence and other reasons.

I. She also argued that she had been deprived of a meaningful opportunity to contest the victim's claim.

J. The State responded by arguing that there was sufficient evidence to support restitution of just under $7,000, even without additional evidence from the victim.

K. The court instead increased the restitution award to just under $41,000 and denied Quijada's request to subpoena the victim to testify about her claims.

L. The Court of Appeals recognized that the State has the burden to prove restitution by a preponderance of the evidence. ¶22

M. The Court held that defendants have a due process right to challenge the evidence supporting a restitution claim and to present their own evidence at sentencing or a separate hearing. ¶24

N. And that the trial court violated that right when it ordered Quijada to pay restitution given the discrepancies in the victim's claims, the lack of sworn

TESTIMONY AND THE LACK OF EVIDENCE CORROBORATING THE VICTIM'S ESTIMATES OF THE VALUE OF THE ALLEGEDLY MISSING ITEMS. ¶27

O. DEFENDANTS ARE ENTITLED TO A "MEANINGFUL OPPORTUNITY" TO CONTEST THE RESTITUTION CLAIM, INCLUDING THE RIGHT TO SUBPOENA THE VICTIM TO TESTIFY AT THE RESTITUTION HEARING IN APPROPRIATE CIRCUMSTANCES. ¶¶28-29.

P. "BUT WHERE EVENTS OR CIRCUMSTANCES CALL THE VERACITY OR ACCURACY OF EVIDENCE CONCERNING RESTITUTION INTO DOUBT, AND THE DEFENDANT CANNOT ADEQUATELY CHALLENGE THAT EVIDENCE WITHOUT QUESTIONING THE VICTIM IN OPEN COURT UNDER OATH, DUE PROCESS REQUIRES THAT THE DEFENDANT BE GIVEN THE OPPORTUNITY TO DO SO." ¶29

Q. THE COURT ALSO HELD THAT THE VICTIMS BILL OF RIGHTS AND RELATED STATUTES AND RULES DO NOT GIVE THE VICTIM THE RIGHT TO REFUSE A SUBPOENA. ¶33

R. HOWEVER, IF THE VICTIM FAILS TO APPEAR, THEY MAY NOT BE HELD IN CONTEMPT, BUT THE COURT MUST DRAW A NEGATIVE INFERENCE FROM THEIR FAILURE TO APPEAR IN DETERMINING WHETHER THE STATE HAS MET ITS BURDEN OF PROOF. ¶¶36-38

S. OTHER REMEDIES FOR THE VICTIM'S FAILURE TO APPEAR MAY ALSO BE APPROPRIATE, INCLUDING THE STRIKING THE VICTIM'S ENTIRE CLAIM. ¶39

T. **RESTITUTION ORDERS HAVE REAL LIFE IMPACT ON DEFENDANTS, WHETHER IN DOC, ON PROBATION OR OUT OF CUSTODY. SO, CHALLENGE THOSE CLAIMS. TOO MANY OF US ARE NONCHALANT ABOUT THE SUBJECT OF RESTITUTION.**